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No. 89-1236

In The

Supreme Court of the United States

October Term 1989

BOARD OF COUNTY COMMISSIONERS
OF LAWRENCE COUNTY, OHIO,

Petitioner,

v.

L. ROBERT KIMBALL & ASSOCIATES,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals decision, which reversed the District Court's vacation of an arbitration award, correctly applied the deferential standard of review mandated by the numerous prior decisions of this Court concerning enforcement of arbitration awards?

2. Whether the "public policy" exception to the enforcement of arbitration awards is applicable where the purported public policy is based upon general statements in a 1924 decision of the Ohio Supreme Court that contracts which extend beyond the term of the Board of County Commissioners who execute them are "looked upon with disfavor"?

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L. ROBERT KIMBALL & ASSOCIATES,

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On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent L. Robert Kimball & Associates (hereinafter "Kimball")[1] respectfully submits that the petition of the Board of County Commissioners of Lawrence County, Ohio (hereinafter the "County") for a writ of certiorari should be denied.

[1] Pursuant to Supreme Court Rule 29.1, Kimball, a sole proprietorship, states that it has no affiliate corporations or subsidiaries except closely held subsidiaries.

STATEMENT OF THE CASE

This case involves the efforts of Kimball to enforce rights under agreements between Kimball and the County which were executed on June 19 and June 25, 1971. Under the agreements, Kimball agreed to provide certain engineering services to the County in connection with preliminary studies of a proposed county-wide sewage treatment system. The County was obliged to compensate Kimball for these preliminary services only if the sewage project proceeded beyond the preliminary engineering report phase. In addition, the County agreed that if the project proceeded beyond the preliminary engineering phase, Kimball would be engaged to perform engineering work on all phases of the project, as follows:

> In the event that any or all of the recommended sewer district projects proceed beyond the preliminary engineering report phase, the owner agrees to engage the engineer to perform all other phases of the work of each sewer district in accordance with this agreement.

Both contracts contained arbitration clauses, stating that all questions in dispute under the Agreements would be arbitrated in accordance with the Rules of the American Arbitration Association.

During 1984, Kimball became aware that funding for the county-wide sewage project in Lawrence County had been received, that the project was to proceed, and that the County had hired another engineering firm to perform engineering services for the project.[2] Kimball, by

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[2] In accordance with the 1971 Agreements, Kimball delivered two preliminary engineering reports to the County during

(Continued on following page)

letter dated April 9, 1984, demanded that it be compensated in accordance with the 1971 Agreements, and that the County comply with its contractual obligation to retain Kimball to perform final design work for the county-wide project. When the County refused, Kimball submitted a demand for arbitration under the American Arbitration Association's Construction Industry Arbitration Rules, in accordance with the arbitration clauses in the 1971 Agreements which provided for binding arbitration of all questions in dispute.

On February 22, 1985, faced with a scheduled April 3, 1985 hearing date in the arbitration proceedings, the County commenced the instant litigation by filing a complaint in the Court of Common Pleas of Lawrence County, Ohio. In the complaint initially filed by Lawrence County,

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(Continued from previous page)

1971 and 1972, which analyzed and recommended the establishment of various subdistricts for a county-wide sewage program, and proposed upgrading a treatment plant located in the County. In addition to producing these two preliminary reports, Kimball provided services during the 1971-1972 period which included attending various meetings concerning the County's waste water treatment problems; preparing responses to violation and penalty letters from state health and water authorities; and serving as the County's representative in dealing with state and regional pollution-control agencies. Beginning in 1973, however, Kimball's involvement with the County decreased because of the entry of the Army Corps of Engineers, who commenced regional pollution planning studies in conjunction with the passage of Water Pollution Control Act Amendments of 1972. The Army Corps eventually completed a series of facilities plans addressing the County's sewage problems. The activity of the Army Corps on this project terminated in August, 1981, following completion of a second facilities plan in October, 1980.

claims were asserted against Kimball under an Ohio statute prohibiting certain anticompetitive trade practices, popularly known as the "Valentine Act", 13 Ohio Rev. Code Ann. § 1331.01 *et seq.* The thrust of the County's initial complaint was that Kimball was attempting to monopolize engineering and architectural consulting business in southeast Ohio by virtue of the 1971 Agreements. In addition to seeking money damages, the County requested an injunction enjoining the pending arbitration proceeding.

On March 5, 1985, Kimball filed a petition for removal, under which the case was removed to the United States District Court for the Southern District of Ohio on the basis of the diverse citizenship of all parties. Subsequently, Kimball filed an answer and counterclaim, including a request for an injunction under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, requiring Lawrence County to continue participation in the pending arbitration proceeding before the American Arbitration Association. On May 30, 1985, following a hearing and briefing with respect to Kimball's request for an injunction compelling arbitration, the District Court issued an Opinion and Order requiring Lawrence County to proceed to arbitrate the contractual issues before the American Arbitration Association.[3] In so ruling the District Court rejected the County's argument that it should not be required to

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[3] The District Court's May 30, 1985 Memorandum Opinion and Order granting Kimball's Motion for Preliminary Injunction was not included by Petitioner as an appendix to the Petition for Writ of Certiorari. Accordingly, that Opinion and Order is reproduced herein as Appendix A.

arbitrate the issue of whether, because the 1971 Agreements extended beyond the term of office of the 1971 County Commissioners, the 1971 contracts were *ultra vires* or otherwise unenforceable for public policy reasons. In that regard, the District Court ruled that the federal policy in favor of submitting claims to arbitration required submission of that defense for resolution by the arbitrators, because it was merely a defense to the entire contract as opposed to a defense challenging the validity or enforceability of the contract's arbitration clause. *See* Appendix A at 4 – 6 (*citing Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967).

In accordance with the District Court's Order, the parties proceeded to arbitrate Kimball's contract claims before a panel of three arbitrators appointed pursuant to the rules of the American Arbitration Association. During a five-day hearing held before the arbitration panel, both parties presented extensive testimony and documentary evidence in support of their positions. The County's primary defenses to the claims asserted by Kimball included (1) that Kimball had failed to perform its contractual obligations by completing an inadequate feasibility report which was never used to obtain government funding; (2) that Kimball had abandoned its contract with the County by failing to contact the County or perform services subsequent to 1973; (3) that Kimball's claim was barred because federal procurement regulations in effect in 1978 required a competitive bidding process, and prevented recovery of lost profits for termination of engineers; and (4) that the 1971 contracts were unenforceable because they extended beyond the term of office of the 1971

Commissioners, and there was no evidence to establish that the public welfare required such long-term contracts.

Kimball, on the other hand, presented to the arbitrators testimony demonstrating (1) that the sewage system recommended in Kimball's 1972 reports was similar to the system eventually designed in 1984; (2) that the federal regulations relied upon by the County were not applicable because the design work in 1984 was not performed pursuant to any federal grant and therefore did not implicate federal regulatory standards; (3) that Kimball's obligations under the 1971 contracts were completed upon Kimball's publication of the feasibility studies, because the County never requested performance of additional services, and no additional services were required by the contracts until such time as the County made a decision to proceed with the project and authorized design work; and (4) that the contracts were enforceable notwithstanding the long-term and contingent nature of the obligations contained therein, because the County had made a reasoned decision in 1971 to obtain free engineering services in exchange for the commitment to hire Kimball for future design work the project went forward.

Following the five-day hearing, the parties filed post-hearing briefs which contained a detailed recitation of the facts and applicable law relating to their respective positions, including a detailed discussion of the defenses asserted by the County that the contracts were invalid because of public policy and were inconsistent with federal regulations.

On March 20, 1986, the arbitration panel entered a unanimous award ordering Lawrence County to pay

Kimball $137,351 plus interest at a 10% rate commencing 30 days after entry of the award. As is common in American Arbitration Association proceedings, the award contained no discussion of the reasoning or basis relied upon by the arbitrators in reaching their result, but was merely a summary-type award disposing of the issues presented.

Subsequent to the entry of the award, the County amended its complaint in the instant action to add a count seeking vacation of the arbitration award. Kimball also amended its answer to the complaint to add a counterclaim seeking confirmation of the award pursuant to Section 9 of the Federal Arbitration Act. On March 18, 1987, the District Court entered an Order granting the County's motion for summary judgment and vacating the arbitration award, and denying Kimball's motion for summary judgment and request for confirmation of the award. The basis for the District Court's vacation of the arbitration award was its conclusion that the award violated public policy by enforcing a contract which extended beyond the term of the commissioners who executed it, and because it was inconsistent with certain federal regulations governing procurement under Environmental Protection Agency procedures. (See Pet. App. C at 10-17).

On appeal, the Court of Appeals for the Sixth Circuit reversed. Noting the limited role that a court plays in reviewing an arbitration decision, the Court of Appeals initially pointed out that the County's arguments that the 1971 contracts were *ultra vires* and were inconsistent with federal regulations had been fully presented to the arbitrators, and that although the arbitrators issued no written opinion, one "must of necessity assume that the arbitrators, in order to rule for Kimball, determined that

the contracts were valid, enforceable contracts between the parties." (Pet. App. A at 10.) Because the Court could not conclude that in rejecting these legal defenses the arbitrators had engaged in a "manifest disregard" of the law, the Court of Appeals reversed the District Court's determination that the contracts were unenforceable because of the applicability of federal statutes and regulations. (*Id.* at 20-21).

Similarily, the Court of Appeals rejected the County's argument that the arbitration award was unenforceable because it enforced a contract which violated public policy. With respect to this claim, the Court of Appeals noted that no Ohio statute absolutely prohibited county commissioners from entering into contracts which extended beyond their term of office, and there was no clear legal precedent to the effect that such contracts were in all cases unenforceable. (Pet. App. A at 15 – 20). After analyzing the Ohio judicial precedent concerning contracts entered into by public bodies which extended beyond the term of the County commissioners who executed them, the Court of Appeals concluded that the 1971 Kimball contracts, under which the County received free engineering services in exchange for a promise to retain Kimball to perform future engineering work, were fully consistent with Ohio law. Accordingly, the Court concluded that the arbitration award upholding those contracts did not violate any "well-defined and dominant" public policy, and therefore must be enforced. (Pet. App. A at 20).

REASONS FOR DENYING THE WRIT

I. The Decision Of The Court Of Appeals Is Fully Consistent With The Decisions Of This Court And Of Numerous Courts Of Appeal Concerning The Enforcement To Arbitration Awards.

This Court has repeatedly emphasized that there exists a strong federal policy of encouraging alternative dispute resolution through arbitration as a means of avoiding the delays and expenses of judicial litigation. This policy has been embodied in the Federal Arbitration Act, a statute interpreted as exemplifying Congress' intent to encourage the voluntary resolution of disputes pursuant to contractual arbitration procedures by "moving the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Memorial Hospital v. Mercury Construction*, 460 U.S. 1, 24 (1983). The rationale for this policy was explained in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) as being predicated upon the desire to achieve orderliness and predictability in business transactions. 417 U.S. at 516.

In recent years, this Court has taken forceful steps to reemphasize the importance of the federal policy embodied in the Federal Arbitration Act of encouraging alternative dispute resolution by private litigants. *See, e.g., Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Perry v. Thomas*, 482 U.S. 493 (1987). In addition, Congress has recently reaffirmed its desire to

encourage use of arbitration as an alternative to litigation, through the establishment of an experimental system for arbitration referrals administered by federal district courts. *See* Judicial Improvements and Access to Justice Act of 1988, 28 U.S.C. §§ 651-658. Congress also included alternative dispute resolution as one of the subjects to be addressed by the Federal Court Study Committee, created by the Judicial Improvements Act to study problems and issues currently facing courts of the United States.[4]

Obviously, an important corollary to the federal policy encouraging resolution of disputes through the arbitral process is the requirement that decisions of arbitrators be accorded great deference by courts called upon to enforce and confirm such awards. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 479 U.S. 614, 638 (1985) ("the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal"). Thus, Section 10 of the Federal Arbitration Act narrowly limits the instances in which a court may vacate an arbitration award to situations

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[4] On December 22, 1989, the Federal Courts Study Committee issued a tentative report which recommended that the experimental system for alternative dispute resolution included by Congress in Title 9 of the Judicial Improvements Act be continued and possibly expanded. The Committee strongly recommended continued use of alternative dispute resolution devices as a means of easing the congestion presently existing in the federal courts. *See* Federal Courts Study Committee, *Tentative Recommendations for Public Comment* (Dec. 22, 1989) at pp. 38-48.

involving (a) corruption, fraud or undue means; (b) partiality or corruption among the arbitrators; (c) misconduct by the arbitrators or procedural deficiencies in the arbitration process; or (d) conduct by the arbitrators which exceeds their powers. 9 U.S.C. § 10.

Courts have consistently enforced the congressional desire to accord finality to arbitral awards by ruling that the circumstances justifying vacation or modification of an arbitration award are limited to those expressly set forth in the Federal Arbitration Act, and to circumstances in which the arbitrators either exhibited a manifest disregard for the law or rendered an irrational decision which is devoid of any evidentiary support. *See, e.g., Wilko v. Swan*, 346 U.S. 427, 436-37 (1953).[5] In addition, in *W.R. Grace & Co. v. Local Union No. 759*, 461 U.S. 757 (1983), this Court indicated that a reviewing court may refuse to enforce an arbitration award which violates public policy. Both the decision in *W.R. Grace* and subsequent decisions emphasize, however, that this so-called "public policy"

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[5] The late Justice Stewart, sitting by designation with the Sixth Circuit in *National Post Office v. United States Postal Service*, 751 F.2d 834 (6th Cir. 1985), emphasized the narrowness of this scope of review, writing that "an arbitrator's decision is entitled to great deference and generally should be upheld absent irrationality or disregard of plain and unambiguous language in the Agreement." 751 F.2d at 840. As the Seventh Circuit noted in *E.I. DuPont de Nemours v. Grasselli Employees Independent Ass'n*, 790 F.2d 611, 614 (7th Cir.), *cert. denied*, 107 S.Ct. 186 (1986), "[a]rbitration is an alternative to the judicial resolution of disputes, and an extremely low standard of review is necessary to prevent arbitration from becoming merely an added preliminary step to judicial resolution rather than a true alternative."

exception to enforcement of arbitration awards is extremely narrow, and that in order to provide a basis for refusal to enforce an arbitration award, a public policy "must be well-defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interest.' " *W.R. Grace, supra,* 461 U.S. at 766. *See also United Paperworkers International Union v. Misco, Inc.,* 484 U.S. 29 (1987).[6]

The decision of the Court of Appeals in the instant case, which reversed the District Court's vacation of the arbitration award entered in favor of Kimball on March 20, 1986, is fully consistent with the above decisions of this Court and of other courts of appeals concerning the narrow scope of review applicable to arbitration awards. Both of the arguments relied upon by the District Court as a basis for vacating the March 20, 1986 arbitration award were fully litigated before the arbitration panel, and were addressed extensively by both parties in briefs and reply briefs filed following the five-day arbitration hearing. *See* pages 5-6 *supra.* Notwithstanding the arbitrators' review of all pertinent evidence, their consideration

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[6] Various courts of appeal have uniformly followed this Court's admonitions concerning the narrow scope of the public policy exception to enforcement of arbitration awards. *See, e.g., American Postal Workers v. United States Postal Service,* 789 F.2d 1, 8 (D.C. Cir. 1986) ("judges have no license to impose their own brand of justice in determining applicable public policy; thus, the exception applies only when the public policy emanates from clear statutory or case law, *'not from general considerations of supposed public interests'* "); *Northrop Corp. v. Triad Marketing S.A.,* 811 F.2d 1265, 1270-71 (9th Cir. 1987), *cert. denied,* 108 S.Ct. 261 (1988).

of the legal arguments made in the briefs, their opportunity to judge the credibility and demeanor of witnesses, and the admitted lack of any evidence or argument that the arbitrators exceeded their powers or that their award was somehow motivated by corruption, fraud or partiality, the District Court proceeded to address the substantive merits of the parties' claims in the course of overturning the arbitration award. (*See* Pet. App. C at 7-17). The broad standard of review applied by the District Court in this regard contravened the principles announced by this Court concerning the deferential standard of review applicable to arbitration awards, and the Court of Appeals' decision reversing the District Court's vacation of the award was clearly mandated by application of the appropriate deferential standard.

In support of its petition, the County has asserted that a broader scope of review is necessary in cases involving arbitral disposition of statutory rights, in light of the expansion of the scope of arbitral matters announced by this Court in recent decisions such as *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). *See* Petition at 13-15. Specifically, the County asserts that a reviewing court should be authorized to apply a broader standard of review in instances in which the arbitrators failed to provide reasons for their award. *Id.* The County advances this argument despite its recognition of the many decisions which firmly hold that arbitrators are not required to explain the reasoning supporting an arbitration award, and that the failure of arbitrators to provide an explanation for their award does not authorize a reviewing court to substitute

its judgment for the judgment embodied in the award. *E.g., United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960).[7]

Contrary to the County's assertion, the Court of Appeal's decision is fully consistent with this Court's decisions in *Shearson/American Express* and *Mitsubishi Motors*. Unlike the claims involved in those cases, which contemplated arbitral resolution of claims under remedial statutes such as the Federal Securities Act, Racketeer Influenced and Corrupt Organizations Act, and Sherman Act, the instant case did not involve arbitral resolution of any separate statutory claim or cause of action. To the contrary, this case involved legal defenses to a contract claim which were predicated upon allegations that the contract was inconsistent with federal regulations, and was beyond the scope of authority of the commissioners who executed it. Authorizing a broader standard of review merely because the arbitration award did not state any reasons for the rejection of these defenses would constitute a drastic departure from the standards which have been repeatedly announced by this Court over the past thirty years in decisions involving judicial review of arbitration awards. Adoption of the County's suggested

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[7] *See also Stroh Container Co. v. Delphi Industries, Inc.*, 783 F.2d 743, 750 (8th Cir.), *cert. denied*, 476 U.S. 1141 (1986) ("to allow a court to conclude that it may substitute its own judgment for the arbitrator's whenever the arbitrator chooses not to explain the award would improperly subvert the proper functioning of the arbitral process"); *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1215 (2d Cir. 1972) ("forcing arbitrators to explain their award . . . will unjustifiably diminish whatever efficiency the process now achieves").

standard would also directly contravene the principal policy underlying alternative dispute resolution, which is designed to resolve claims in a streamlined and less expensive process.[8]

Because the decision of the Court of Appeals is fully consistent with both the prior decisions of this Court, and with the congressional policy favoring alternative dispute resolution, the petition for a writ of certiorari should be denied.

II. The County's Public Policy Argument Involves A Narrow Issue Of State Law Which Does Not Merit This Court's Plenary Review.

The "public policy" argument articulated by the County in support of its petition for certiorari amounts to

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[8] The instant case presents a glaring example of how the federal policy encouraging alternative dispute resolution through arbitration can be frustrated by application of an overly broad standard of review in actions to vacate arbitration awards. This case commenced with the filing of a demand for arbitration by Kimball on May 18, 1984. Now, almost six years later, the issues raised by that arbitration demand remain unresolved, notwithstanding the expenditure of considerable effort and resources by both parties in connection with (1) the hearing and briefing relating to Kimball's Motion for Preliminary Injunction forcing the County to participate in the arbitration proceedings; (2) the appearance of counsel and witnesses at five days of hearing before three arbitrators, followed by extensive post hearing briefs and reply briefs filed by both parties; and (3) extensive briefing and proceedings before the District Court and Court of Appeals in connection with efforts to vacate the arbitration award. This six year odyssey through the arbitral and judicial process is hardly the streamlined and economic method of alternative dispute resolution which the Federal Arbitration Act was enacted to encourage.

nothing more than a disagreement with the Court of Appeals' interpretation of Ohio law, and the application of that law to the Kimball 1971 Agreements. The issue raised by the County's "public policy" argument – *i.e.*, whether a board of county commissioners may enter into a long-term contract which extends beyond their term of office – is clearly not the type of nationally significant issue which warrants this Court's plenary consideration.

As the Court made clear in *W.R. Grace Co., supra*, only a "well-defined and dominant public policy" supports removing an issue from arbitral resolution. Far from being a well-defined and dominant public policy, the *ultra vires* defense asserted by the County is nothing more than a question of authority – *i.e.*, did the commissioners who entered into the contracts with Kimball in 1971 have authority to bind the County to a contract which extended beyond their term of office. Resolution of that issue is no different than resolution of any issue of authority in a contract dispute, whether it be a determination of an agent's authority to enter into a contract on behalf of his principal or a corporate president's actual or apparent authority to bind the corporation without approval of the board of directors. Resolution of that issue in the instant case turned on application of the legal principles enunciated by the Ohio Supreme Court in decisions such as *State ex rel. Allen v. Lutz*, 111 Ohio 33, 145 N.E. 483 (1924). The Court of Appeals thoroughly examined both the legal and factual aspects of this issue in determining that the Kimball agreements were enforceable. (See Pet. App. A at 14-21).

The County has failed to articulate any reason why this issue – which is limited to an interpretation and

application of Ohio law – warrants this Court's plenary review. Because the "public policy" argument asserted by the County is a factual issue involving application of Ohio law to the unique facts of the case, the Court of Appeals' resolution of this issue should not be disturbed. The issue merely involves application and interpretation of state law which has no significance beyond the specific factual scenario presented by this case.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

BOARD OF COUNTY COMMISSIONERS OF LAWRENCE COUNTY, OHIO, Plaintiff, vs. L. ROBERT KIMBALL AND ASSOCIATAES, et al., Defendants.	:	No. C-1-85-667 OPINION AND ORDER GRANTING DEFANDANT'S MOTION FOR PRELIMINARY INJUNCTION (Filed May 30, 1985)

SPIEGEL, J.:

This matter came on for consideration on defendant L. Robert Kimball and Associates' (Kimball) motion for a preliminary injunction (doc. 6), later accompanied by a memorandum in support (doc. 11). Plaintiff filed a memorandum in opposition (doc. 10). Oral argument was held on April 5, 1985 and, pursuant to our Order from the Bench, both parties submitted supplementary memoranda (docs. 13 and 14).

The facts necessary for our decision are as follows. Pursuant to a 1971 agreement between defendant Kimball and the Board of County Commissioners of Lawrence County, Ohio (County), and the arbitration clause contained therein, Kimball demanded arbitration, claiming that the County had hired another engineering company to render services that had been promised to Kimball. The County filed a claim in state court against Kimball and

the American Arbitration Association (AAA), claiming violation of the Valentine Act, Ohio Rev. Code § 1331 *et seq.* It alleged that Kimball is attempting to and succeeding at monopolizing the engineering and architectural consulting business in southeastern Ohio by virtue of the 1971 agreement whereby the County was obligated to engage Kimball's services in connection with the construction of a new sewer system.[1] The County sued for money damages as well as an injunction to halt an arbitration proceeding before the AAA that had been commenced pursuant to the 1971 agreement.

On the basis of diversity of citizenship, defendant Kimball removed this case to the federal court, filed its answer, and filed a counterclaim seeking an injunction under common law and the Federal Arbitration Act to require the County to continue its participation in the arbitration proceeding. Kimball then filed its formal motion for a preliminary injunction.[2]

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[1] In its memorandum in opposition to defendant's motion for a preliminary injunction, the County indicates its belief that the 1971 agreement also violates the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.*, and its intention to file an amended complaint. However, as of this writing, plaintiff has not moved for leave to file such a pleading.

[2] During oral argument, counsel for Kimball indicated that a motion for preliminary injunction was filed rather than a motion to compel arbitration under 9 U.S.C. § 4 because the County complied initially and went forward with arbitration. We shall proceed to consider defendant's motion as if it were styled in the latter fashion and therefore will not analyze this case in terms of the traditional four factors that determine whether injunctive relief ought to be granted. *See, e.g., Warner v. Central Trust Co.*, 715 F.2d 1121, 1123 (6th Cir. 1983).

Plaintiff's memorandum in opposition to the instant motion contended, in essence, that antitrust claims are not appropriate subjects for arbitration. Because the gravamen of its complaint turns on allegations of state antitrust laws, it maintained that Kimball's motion to compel arbitration ought to be denied until after plaintiff's antitrust claims were adjudicated.

That antitrust claims are unsuitable for arbitration, *see generally Applied Digital Technology, Inc. v. Continental Casualty Co.*, 576 F.2d 116, 117 (7th Cir. 1978); *Androit v. Quickprint of America, Inc.*, 563 F. Supp. 48, 50-51 (S.D. Ohio 1983); *Big Apple Cookie Co. v. Springwater Cookie Co.*, 517 F. Supp. 367, 368-69 (S.D. Ohio 1981), is not an issue of dispute between the parties. Rather, plaintiff's argument is not well-taken because of *Dean Witter Reynolds, Inc. v. A. Lamar Byrd*, 105 S. Ct. 1238 (1985), decided March 4 of this year. In that case the Supreme Court rejected the so-called "intertwining doctrine" and ruled that a federal district court must compel arbitration of pendant state law claims even when that court eventually will assert jurisdiction over a federal law claim.[3] *Id.* at 1240-41. Although the federal law involved was the Securities Exchange Act rather the Sherman Act, we consider *Dean Witter* to be dispositive of the question at hand.

The doctrine of intertwining grew out of the notion that a district court ought to possess discretion to deny

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[3] The Supreme Court granted certiorari to resolve a conflict among the Courts of Appeals. Our parent circuit previously had rejected the intertwining doctrine. *See Liskey v. Oppenheimer & Co.*, 717 F.2d 314 (6th Cir. 1983).

arbitration when arbitrable and nonarbitrable claims, sufficiently intertwined factually and legally, stem from a single transaction because: (1) the federal court has exclusive jurisdiction over federal securities claims and possible an arbitrator could make findings as to an arbitrable state claim that might have a preclusive effect on the court; and (2) bifurcation foments inefficiency as factual question may be litigated twice. *Id.* at 1240. But the Supreme Court rejected the doctrine based on Congress's keen interest behind passage of the Federal Arbitration Act – to wit, quick resolution of disputes that arise between parties to a contract in which a negotiated arbitration provision is contained. *Id.* at 1242. This Court can draw no distinction between the federal securities laws and the federal antitrust statutes that would merit a legitimate departure from the reasoning outlined above. Consequently, we view *Dean Witter* as precedent binding us to rule in favor of defendant Kimball.

However, at oral argument, the Court raised an issue of our own. The contract in dispute lacks a term provision, prompting the Court to query whether the agreement is *ultra vires* and, whether, as a consequence, it is rendered inappropriate for arbitration. From the Bench, counsel were ordered to brief the issues so delineated. Having been favored with counsel's views, we conclude that arbitration remains the proper course and we rule accordingly in defendant Kimball's favor.

County commissioners in Ohio serve four-year terms. Ohio Rev. Code § 305.01(C). As the disputed contract contains no term provision, on its face the agreement presents an issue regarding whether the members that

executed the contract did so such that they bound successor boards. Plaintiff proffers case law indicating that, at the very least, such "successor binding" contracts are not favored in the law. *See, e.g., State ex rel. Allen v. Lutz*, 111 O.S. 333, 338-39, 145 N.E. 483, 484-85 (1924). Yet while we remain concerned over the *ultra vires* issue, we recognize that such contracts are not void automatically. *See id.; see also* 20 O. Jur. 3d *Counties* § 262 (1980) and the cases cited therein. Moreover, speculation on the *ultra vires* issue actually begs the question. Assuming, for the moment, the likelihood that Ohio law would direct a finding that the contract in fact is *ultra vires*, this Court presently remains faced with the task of determining whether the Federal Arbitration Act nonetheless compels us to order arbitration pursuant to the arbitration clause contained in the agreement. We believe we are so compelled.

The County suggests that arbitration ought not to be ordered based on its conclusion that an assertion of *ultra vires* in this context falls within the public policy exceptions to arbitration. Just as antitrust questions are inappropriate for arbitration resolution because of the public impact such disputes raise, so, too, plaintiff argues, are claims alleging that previous commissioners overstepped their bounds in executing a contract to implement a community sewer system.

Not true, maintains defendant Kimball, on the authority of *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967). In *Prima Paint*, one party to a contract that contained an arbitration provision for all disputes filed suit in federal court to rescind the agreement, alleging fraud in the inducement. The Supreme Court ruled that a stay under the Federal Arbitration Act

had been granted properly as the arbitration provision was separable from the contract as a whole. Only "if the claim is fraud in the inducement of the arbitration clause itself – an issue which goes to the 'making' of the agreement to arbitrate – [may] the federal court . . . proceed to adjudicate it." *Id.* at 403-04. Thus, the court concluded that a claim of fraud in the inducement as to the entire contract correctly was referred to arbitration. *See id.* at 402.

The instant matter is analogous to the facts in *Prima Paint*. Like fraud in the inducement, *ultra vires* is a legal defense to the enforceability of a contract. There has been no allegation that the *ultra vires* defense applies only to the arbitration provision. Consequently, we view *Prima Paint* as controlling and conclude that we must grant defendant Kimball's motion to require the County to participate in the arbitration proceeding already commenced.

In summary, we hereby grant defendant Kimball's motion, styled as one for preliminary injunction, to compel arbitration pursuant to 9 U.S.C. § 4.

SO ORDERED.

/s/ S. Arthur Spiegel
S. Arthur Spiegel
United States District Judge